NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-862

PATRICK BOSAH

vs.

CITY OF BOSTON & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After defendants city of Boston (city) and Vivian Leo failed to promote him to a supervisor of accounting position in 2011, the plaintiff, Patrick Bosah, brought a complaint with the Massachusetts Commission Against Discrimination (MCAD) alleging that their failure to promote him was racially discriminatory in violation of G. L. c. 151B, § 4. MCAD did not act within ninety days, so Bosah brought the same claim in Superior Court pursuant to G. L. c. 151B, § 9. His Superior Court complaint also alleged that the defendants retaliated against him for filing the MCAD complaint.[2] A judge granted summary judgment in favor of the defendants, and we reverse.

[1] Vivian Leo.

[2] He also brought a breach of contract claim, which was dismissed by stipulation.

Background. Viewing the facts in the light most favorable to the nonmoving party, here Bosah, in accordance with the well-rehearsed standard for summary judgment, the record reveals the following.

Bosah, a black man of Nigerian descent, has been employed as a principal accountant in the city's treasury department (department) since 1993. His position is a clerical one, and he is paid at a grade of R-16. He has a bachelor's degree in business administration and a master's degree in operations management. Leo, a white woman, is the department's first assistant collector-treasurer and has worked for the city since 1974.

Bosah and Leo clashed from the beginning of Bosah's employment. Bosah had applied for a position whose description included the supervision of accountants and clerical workers. However, Bosah was never given the opportunity to supervise. As a result, he requested a meeting with Leo and his immediate supervisor, Joseph Byrne, to clarify his responsibilities. Leo "brushed [him] off," and, after he noted to her that she had given unposted promotions to several white individuals, said, "Don't worry. I have already given it to them, you are going to be next."

The next day, Leo falsely accused Bosah of running a private financial consulting business and told him that that

would be his last day at work. After he denied having such a business, Leo requested he put his denial in writing, which he did. Leo then asked him for his immigration papers and transcripts from the schools he had attended, which Bosah provided. After this incident, Bosah experienced a "very hostile environment," Leo's attitude changed for the worse, and he applied for several positions but was rejected in favor of less qualified white applicants. Leo told him that "nothing is going to change, that [he] cannot come from the street and become a manager in here . . . ."

In 1997 Bosah filed a complaint with MCAD alleging that he was not promoted to two positions on account of his race. MCAD found insufficient evidence to support Bosah's allegations, and he did not pursue that action further.

Shortly after Bosah filed the 1997 complaint, Leo promoted Priscilla Flint, a black woman, to be Bosah's direct supervisor. Leo "put pressure on [Flint] to stay on [Bosah]," which Flint interpreted as instruction to write him up on "every little thing he did." Flint was not instructed to, and was admonished by Leo for, disciplining other employees for similar misconduct. For example, Leo instructed Flint to write Bosah up for tardiness, but called Flint into her office for reprimanding nonblack employees who were regularly late. In addition, when Bosah would complain of discrimination, Leo would respond, "What

about Priscilla? She is a black person." Flint apologized to Bosah following her retirement after ultimately realizing that Leo "was not happy with [Bosah] and she just wanted me to help her get rid of him." However, Flint stood by the substance of her reviews, including a letter she wrote in 2009 "seeking help to either layoff or fire an unproductive employee [Bosah]," in which she stated that Bosah "has been a major problem" and "is well paid for doing nothing."

Between 1997 and 2010, Bosah was given several suspensions and more written warnings than he could recall. This included one suspension in 2006 by Flint, at the ultimate direction of Leo, for allegedly causing a printer jam which, he claims, he did not cause. Bosah filed an MCAD complaint relating to this incident alleging racial discrimination, in which he also alleged racial discrimination because a less experienced Hispanic employee, Chinele Velazquez, was selected to cover Flint's position while Flint was on vacation, and retaliation for the filing of his previous MCAD complaint.

In 2010, Bosah was suspended for three days for insubordination and conduct unbecoming a city employee. Bosah filed a grievance with his union. Bosah and the city then executed a settlement agreement in which the city agreed to drop the charge of insubordination and remove all written warnings from the last two years from Bosah's personnel file. In

exchange, Bosah agreed to accept a one-day suspension and to "waive any and all personal claims, actions, and complaints and release[] the City of Boston, its representatives, agents and employees from including but not limited to, claims at the . . . Massachusetts Commission Against Discrimination, . . . [and] claims arising under Mass. Gen. Laws c. 151B . . . ."

In October of 2010, Bosah applied for three positions in the department. One was for principal administrative assistant, a management position paid at the MM-6 grade. Bosah was interviewed for this position, but it was ultimately awarded to a white woman. Bosah also applied for two supervisor of accounting positions, a management position paid at the MM-8 grade. Bosah was interviewed for these positions as well, but they were awarded to a Latino man and a white man. During an interview for one of the three positions, one of the interviewers, Richard DePiano, a white man, accused Bosah of making inaccurate statements on his resume. This included a claim that Bosah lied about the existence of an account he claimed to have reconciled; according to Bosah, the account did in fact exist, a statement we must accept on summary judgment. Bosah has not addressed several other claimed inaccuracies.[3]

[3] Bosah's deposition testimony mentions one such alleged inaccuracy, which related to Bosah's handling of 401(k) accounts. According to DePiano, and as Bosah admitted at his deposition, the city does not offer 401(k) accounts. Bosah's

In 2011, Bosah applied for another supervisor of accounting position, which Flint was vacating due to her retirement. A memorandum from the interviewers, Richard DePiano and Gail Hackett, to Leo, who was in charge of the hiring, indicated that Bosah was one of six out of twenty-three applicants who met the minimum qualifications for the position and who were offered an interview. Three were ultimately interviewed: Bosah, Velazquez, and Kempton Flemming, a black man. According to Bosah, his interview lasted between twenty and thirty minutes, and he was asked only three or four questions. In their memorandum, DePiano and Hackett wrote that the candidates were given an equal amount of time, that Velazquez answered all the interview questions correctly, and that both Bosah and Flemming answered less than half correctly. They accordingly recommended that Leo hire Velazquez. Her highest education level was a high school diploma, she had worked in the department since 2002, and she had between two and three years of management experience. Leo promoted Velazquez.

On September 19, 2011, Bosah filed a timely complaint with MCAD, alleging that the defendants' failure to promote him was

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response was that "an employee can subscribe to that within the mutual fund, once the money leaves the City." Because Bosah's resume appears to have been inadvertently left out of the appellate record (it appears in the exhibit list but is not in the corresponding appendix), we cannot assess what Bosah's claim was or whether his response was adequate.

racially discriminatory. Shortly thereafter, on October 7, 2011, DePiano suspended him for three days for insubordination and conduct unbecoming a city employee. This suspension concerned an alleged heated exchange between Bosah and Velazquez. However, in February of 2012 Velazquez wrote a performance review of Bosah covering that period stating that Bosah "shows [a] great deal of respect and proper manners to his coworkers . . . ." Bosah grieved this suspension with his union, arguing that it was in retaliation for his recent MCAD filing. An arbitrator resolved the grievance in favor of the city, finding that Bosah had acted inappropriately and that he had presented insufficient evidence that DePiano knew of the MCAD complaint.

On March 7, 2012, Bosah brought this action in Superior Court, alleging race-based discrimination for the defendants' failure to promote him in 2011, and retaliation for his filing of the 2011 MCAD complaint. The defendants filed their answer on June 8, 2012. Three days prior to the answer, June 5, 2012, Leo delivered a letter to Bosah accusing him of poor work performance. She requested a hearing for June 8 at the city's labor relations office, stating that the hearing would result in discipline, possibly including termination. On June 18, Velazquez suspended Bosah for three days for performance reasons. Bosah again grieved his suspension, which, again, was

ultimately upheld by an arbitrator, who found that it was supported by just cause.

Discussion. 1. Preclusion. Before turning to the discrimination and retaliation claims, we must address the defendants' argument that Bosah is prohibited from relying on certain evidence and litigating certain issues.

First, the defendants argue that the 2010 settlement between Bosah and the city prevents Bosah from relying on any evidence that predates the settlement. This is incorrect as a matter of contract interpretation. Bosah agreed only to "waive any and all personal claims, actions, and complaints." The actionable claims in this case -- the failure to promote Bosah to Flint's former position, and the alleged retaliatory activity following the filing of the 2011 MCAD complaint -- postdate the settlement, and nothing in the settlement indicates that Bosah waived future claims. Moreover, the settlement says nothing about what evidence Bosah may present in subsequent actions against the city or its employees. The 2010 settlement has no effect on the evidence Bosah may rely upon.

Second, the defendants argue that the two prior, unappealed MCAD decisions collaterally estop Bosah from relying on evidence that he presented in those proceedings.

> "Collateral estoppel may be applied defensively if (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is

> asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication is identical to the issue in the current adjudication. . . . Additionally, the issue decided in the prior adjudication must have been essential to the earlier judgment."

Commissioner of the Dep't of Employment & Training v. Dugan, 428 Mass. 138, 142 (1998). Although the defendants' underlying legal principle -- that unappealed MCAD decisions can have collateral estoppel effect on subsequent judicial c. 151B actions -- is correct, see Brunson v. Wall, 405 Mass. 446, 448-453 (1989), that principle has no application to this case. MCAD made no factual findings in the first proceeding, and its conclusion reads in full: "There is insufficient evidence to support the Complainant's allegations of discrimination in violation of the M.G.L. Chapter 151B § 4, paragraph 1 and Title VII of the 1964 Civil Rights Act, as amended." It is impossible to determine why MCAD reached this conclusion or what evidence Bosah introduced.[4] As such, it is impossible to identify any individual "issue decided in the prior adjudication . . . essential to the earlier judgment," Dugan, 428 Mass. at 142, and hence no issue that Bosah could be collaterally estopped from raising. Contrast Brunson, 405 Mass. at 450-451 (applying

[4] This difficulty is compounded by the fact that the summary judgment record does not contain the MCAD filings, which, as the party claiming collateral estoppel, the defendants bore the burden to introduce. See TLT Constr. Corp. v. A. Anthony Tappe & Assocs., 48 Mass. App. Ct. 1, 5 (1999).

collateral estoppel because, inter alia, "the findings set forth in the MCAD decision describe, in detail, the substance of the plaintiff's claim that she was the victim of racial discrimination. These findings demonstrate that the MCAD decided the underlying allegations of racial discrimination raised by the plaintiff's complaint in this action").

In the second MCAD proceeding, Bosah complained that Flint's decision to have Velazquez cover for her while she was on vacation, and Flint's five-day suspension of him for causing a printer jam, were discriminatory. While MCAD found insufficient evidence that Flint -- and, through her, the city -- discriminated against Bosah, those events are relevant in the instant case only insofar as they relate to Leo's alleged discriminatory conduct as Flint's superior. Since the MCAD decision did not even mention Leo, that proceeding cannot collaterally estop anything of significance here.[5]

Finally, the defendants argue that the arbitrator's decisions on Bosah's grievance claims collaterally estop him from raising issues decided by the arbitrator. This argument is foreclosed by our decision in Boston v. Massachusetts Comm'n Against Discrimination, 39 Mass. App. Ct. 234 (1995), in which

[5] We note also that MCAD expressly declined to resolve whether Bosah committed the act that led to his suspension, and hence whether his suspension was warranted. Bosah is therefore not collaterally estopped from litigating that issue.

we held that an arbitrator's decision is not "one to which an agency or court that hears a statutory discrimination claim must ascribe deference or special weight." Id. at 239. The same goes for a statutory retaliation claim.

Having resolved these preliminary issues, we now turn to the merits of the discrimination and retaliation claims. "In reviewing the . . . grant of a motion for summary judgment, we conduct a de novo examination of the evidence in the summary judgment record . . . and view the evidence in the light most favorable to the part[y] opposing summary judgment[,] . . . drawing all reasonable inferences in [the nonmoving party's] favor" (citation omitted). Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016).

2. Discrimination. a. Legal standard. An employment discrimination claim under G. L. c. 151B has four elements: "membership in a protected class, harm, discriminatory animus, and causation." Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001). It is undisputed in this case that Bosah, as a black person who was not promoted, has satisfied the first two elements.

Often plaintiffs will lack direct evidence of discrimination. In these cases, our courts follow the three-stage burden-shifting framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792

(1973). See Wheelock College v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130, 137-139 (1976). This framework permits the finder of fact to infer discriminatory animus and causation from indirect or circumstantial evidence. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 39-40 (2005) ("Direct evidence of those elements [discriminatory animus and causation] rarely exists, . . . and a plaintiff may therefore establish one or both by indirect or circumstantial evidence using the familiar three-stage, burden-shifting paradigm first set out in McDonnell Douglas . . ."). In the first stage, the plaintiff has the burden to establish a prima facie case of discrimination. Second, if the plaintiff can make such a case, the burden shifts to the defendants to identify at least one legitimate, nondiscriminatory reason for their conduct. Third, if the defendants advance such reasons, the burden shifts back to the plaintiff to show that at least one such reason is a pretext. See Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 396-397 (2016). See also Lipchitz, 434 Mass. at 506-507. Although at trial the plaintiff would have the burden to satisfy the first and third stages by a preponderance of the evidence, on a defendant's motion for summary judgment "the burden of persuasion . . . remains with the defendants . . . ." Bulwer, 473 Mass. at 683. The plaintiff, therefore, need only "provide[] evidence sufficient

to allow a reasonable jury to infer" that he or she has satisfied the first and third stages. Id.

b. Prima facie case. i. The test. The parties disagree about what the plaintiff must show to make out a prima facie race discrimination nonpromotion case. The plaintiff argues that he must prove that he was (1) a member of a protected class; (2) who performed his job in a satisfactory manner; and (3) was subject to an adverse employment action. He seeks to borrow this standard from Bulwer and Verdrager, both termination cases, which hold in that context that the plaintiff must show that "(1) he [or she] is a member of a class protected by G. L. c. 151B; (2) he [or she] performed his [or her] job at an acceptable level; [and] (3) he [or she] was terminated." Bulwer, 473 Mass. at 681, quoting Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441 (1995). See Verdrager, 474 Mass. at 396-397. (Bulwer involved race; Verdrager involved gender.) The defendants counter that the plaintiff must establish that (1) he is a member of a protected class; (2) he is qualified for the job; (3) despite his qualifications, he was not promoted (or hired); (4) a person with similar or inferior qualifications was promoted (or hired); and (5) the person promoted (or hired) was not a member of the same protected class as the plaintiff. For this test they cite Somers v. Converged Access, Inc., 454 Mass. 582 (2009), a

failure-to-hire case involving age discrimination, which in that context set forth the following test: "(1) the plaintiff was a member of the class protected by G. L. c. 151B, that is, over forty years of age; (2) he was qualified for the job; (3) despite his qualifications, he was not hired for the job; (4) a person with similar or inferior qualifications was hired; and (5) the person hired was at least five years younger than the plaintiff." Id. at 595. We will assume without deciding the defendants are correct.

ii. Application. Bosah easily satisfies the first, second, third, and fifth factors of the Somers test: (1) he is black; (2) he was one of six out of twenty-three candidates offered an interview for the position, and the memorandum written by DePiano and Hackett indicates that he met "the minimum requirements to be further considered"; (3) he was not promoted; and (5) Velazquez, who received the position, is not black.

The defendants dispute only whether Bosah has satisfied the fourth factor, that Velazquez's qualifications were similar or inferior to his own. In resolving this question, we are guided by the Supreme Judicial Court's instruction that, when assessing c. 151B claims on summary judgment, we must not "resolve issues of material fact, assess credibility, or weigh evidence." Bulwer, 473 Mass. at 689, quoting Kernan v. Morse, 69 Mass. App.

Ct. 378, 382 (2007). "The question of whose interpretation of the evidence is more believable, 'raised by the [parties'] conflicting evidence as to the defendant[s'] motive, is not for a court to decide on the basis of [briefs and transcripts], but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of the witnesses.'" Bulwer, supra, quoting Lipchitz, 434 Mass. at 499.

Viewing the record in the light most favorable to Bosah, a reasonable jury could find that Bosah was at least as qualified as Velazquez. Most notable are his superior educational credentials (a bachelor's and a master's degree versus a high school diploma) and his significantly longer tenure in the department (he was first hired in 1993 as a principal accountant; Velaquez was first hired in 2002 as an assistant principal accountant and was promoted to a principal accountant in 2005, before taking on a management role in 2008).

The defendants make several responses. First, they argue that Velazquez's previous management experience made her more qualified than Bosah. While this is certainly an argument they could make to a jury, a rational jury could also find that Bosah's superior education and longer tenure outweigh Velazquez's two or three years of management experience.

Second, the defendants argue that Bosah's education is irrelevant because it was not a job requirement. This argument

is both misleading and disingenuous. It is misleading because, although the job posting did not list a university degree as a requirement, it listed a bachelor's degree in accounting, finance, or a related field as a preferred qualification, which Bosah's degrees presumably would satisfy. The argument is disingenuous because management experience, on which the defendants place considerable emphasis, was likewise listed as a preferred qualification, not a job requirement.

Third, the defendants argue that Velazquez's superior interview performance demonstrates that she was better qualified. Assuming without deciding that this constitutes a "qualification" with respect to the prima facie test, Bosah introduced evidence that he was not treated fairly in the interview process, which we must credit on summary judgment. A rational jury could therefore choose to ignore the evidence of Velazquez's interview performance. A rational jury could also find this superior interview performance (along with Velazquez's management experience) was outweighed by Bosah's education and tenure.

Fourth, the defendants point to Bosah's allegedly inaccurate resume. Again, assuming without deciding that this is relevant to Bosah's qualifications, Bosah introduced evidence, which we must credit, that at least some of his alleged misrepresentations were not, in fact,

misrepresentations. A rational jury could therefore discredit the claimed inaccuracies on Bosah's resume.

Finally, the defendants argue that Flint's negative appraisals of Bosah's performance are additional evidence that he is less qualified than Velazquez. But this argument fails to take account of Flint's deposition testimony that Leo instructed her to be disproportionately harsh on Bosah, to the point of admonishing her for disciplining other employees who committed similar misconduct. A rational jury could conclude that no similar evidence exists for Velazquez not because of Velazquez's superior qualifications, but because of Leo's discriminatory animus.

We therefore conclude that Bosah has satisfied his burden to present sufficient evidence with respect to the prima facie case of discrimination to defeat summary judgment. The defendants have provided a legitimate, nondiscriminatory reason for hiring Velazquez over Bosah, asserting that they hired Velazquez over Bosah due to her superior qualifications, his poor interview performance, and inaccuracies on his resume. The burden thus returns to Bosah to demonstrate that there is sufficient evidence for the jury to find that at least one of these reasons was pretextual.

c. Pretext. With respect to pretext, c. 151B plaintiffs need only show "that the employer's articulated justification is

not true but a pretext." Blare, 419 Mass. at 443. See Bulwer, 473 Mass. at 681-682. Of course, pretext can be inferred from "[disparate] application of a certain criterion to employees of different races; the employer's general practice and policies concerning employment of racial minorities; and the employer's treatment of the plaintiff during [his or her] employment." McKenzie v. Brigham & Women's Hosp., 405 Mass. 432, 437 (1989), quoting Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761, 767 (1986). While Bosah need only refute one of the defendants' proffered reasons, see Lipchitz, 434 Mass. at 506-507, there is sufficient evidence in the summary judgment record, when viewed in the light most favorable to Bosah, to refute them all.

First, the evidence viewed in this light is sufficient to support a finding that Leo's decision not to promote Bosah was based on discriminatory animus and personal dislike of Bosah. Leo had a consistent practice of treating Bosah more harshly than similarly situated employees that, plausibly, was based on his race. Indeed, the summary judgment record viewed in the light most favorable to the plaintiff includes evidence that Leo was biased from the start, when she did not give him responsibilities corresponding to the job he applied for, told him that he could not just "come from the street and become a manager in here," falsely accused him of operating a private

consulting business, and demanded to see his transcripts and immigration documents. A rational jury could conclude that these statements and demands were made as a result of negative racial stereotyping. (Bosah began work in 1993, and Leo made the demand for the immigration documents in October of 1994. A rational jury could conclude that this demand was not for the purpose of verifying Bosah's work authorization.)

Next, Leo hired Flint to be Bosah's direct supervisor shortly after he filed his first MCAD complaint, and instructed Flint to be disproportionately hard on him, even to the point of admonishing her for disciplining other employees for identical infractions. Bosah also introduced evidence that the suspension that led to his second MCAD complaint, which was imposed on the ultimate authority of Leo, was unjustified.

There is also evidence that Leo did not promote black employees above the MM-8 level. Out of ten employees who held MM-8 positions or higher, only one -- Flint -- was black, and she was promoted shortly after Bosah filed his initial MCAD complaint. This fact, plus Leo's comments to Bosah that he should not complain of discrimination because Flint is black, could support an inference that Flint's promotion was an effort by Leo to cover up her discriminatory nonpromotion of black employees. These practices could support a conclusion that the

proffered reasons for the failure to promote Bosah were pretextual.

Even beyond the practices just described, Bosah has introduced sufficient evidence at the summary judgment stage to raise a genuine issue whether the defendants' claims that his interview performance and lesser qualifications were the real reason for his nonpromotion. To begin with, for the reasons given above, a rational jury could conclude that Velazquez was not more qualified than Bosah. Next, Bosah testified that he was asked only three or four questions at his interview, from which a reasonable juror could conclude that he was not taken seriously despite his qualifications. In addition, DePiano and Hackett's memorandum to Leo describes the unsuccessful candidates -- both black men -- as having identical deficiencies, which a rational jury could find too unlikely to be a coincidence:

> "Both Kempton Flemming and Patrick Bosah answered less than half of the questions relating to payroll and accounts payable operations correctly. The interviewers felt these candidates should have been better prepared to directly address the position's minimum entrance qualifications and if necessary, discuss how they would advance their technical knowledge in areas they were not exposed to in their current positions. Their responses to managing such an operation and problem resolution skills were lengthy but unstructured, and not always relevant. Neither drew sufficiently on his own experiences."[6]

[6] The memorandum noted only one difference: that Flemming but not Bosah had had minimal management experience.

Finally, Bosah introduced evidence that calls into question the alleged resume inaccuracies. Specifically, DePiano stated that Bosah had misrepresented his work in account reconciliation because the account Bosah claimed to have reconciled did not exist. Bosah testified at his deposition that the account did exist, which, viewing the evidence in the light most favorable to him, we must accept as true on summary judgment.

The defendants' only response is to argue that Bosah cannot show pretext simply by creating a dispute as to whether he or Velazquez was the more qualified candidate. See, e.g., Millbrook v. IBP, Inc., 280 F.3d 1169, 1178 (7th Cir. 2002) ("a jury verdict for the employee cannot stand if the jury is simply disagreeing with the company as to who is best qualified"). Assuming without deciding that this legal proposition is correct, it is inapplicable here, for Bosah has offered many reasons other than his qualifications from which a rational jury could infer pretext. We therefore conclude that the judge erred in granting summary judgment in favor of the defendants on the discrimination claim.

3. Retaliation. Bosah argues that his suspensions on October 7, 2011, and June 18, 2012, were in retaliation for filing his complaints with MCAD and in Superior Court.

> "To survive summary judgment on a claim of retaliation, an employee must produce evidence from which a jury could

> infer four elements. First, there must be evidence that the employee reasonably and in good faith believed that the employer was engaged in wrongful discrimination. . . . Second, there must be evidence that the employee acted reasonably in response to that belief, through reasonable acts meant to protest or oppose . . . discrimination (protected activity). . . . Third, there must be evidence that the employer took adverse action against the employee. . . . Finally, there must be evidence that the adverse action was a response to the employee's protected activity (forbidden motive)" (quotations and citations omitted).

Verdrager, 474 Mass. at 405-406.

Bosah has clearly satisfied the first three elements. First, since Bosah's evidence is sufficient to survive summary judgment on his discrimination claim, it is sufficient to support an inference that he had a good faith basis for believing that the defendants were engaged in wrongful discrimination. See Psy-Ed Corp. v. Klein, 459 Mass. 697, 706 (2011) ("A claim of retaliation may succeed even if the underlying claim of discrimination fails . . ."). Second, Bosah's filing of the MCAD and Superior Court complaints, which are undisputed, were protected activity. See Verdrager, 474 Mass. at 408. Third, Bosah's suspensions clearly constitute adverse actions. See O'Brien v. Massachusetts Inst. of Tech., 82 Mass. App. Ct. 905, 909 (2012) (oral and written warnings constitute adverse actions). The only question, therefore, is whether Bosah has introduced sufficient evidence that his

suspensions were a response to his MCAD and Superior Court filings.[7]

As with discrimination claims, plaintiffs may prove the causation element with indirect evidence using a burden-shifting framework similar to that of McDonnell Douglas, 411 U.S. at 802-805:

> "At the first stage, the employee has the burden of producing evidence that [he or she] engaged in protected conduct, that [he or she] suffered some adverse action, and that a causal connection existed between the protected conduct and the adverse action. . . . At the second stage, the employer must then articulate a legitimate, nondiscriminatory reason for the adverse employment decision. . . . At the third stage, the employee must produce evidence that the employer's stated reason for [its adverse action] was a pretext for retaliating against [him or] her on account of [his or] her protected activity. . . . The combination of a prima facie case of retaliation with a showing of pretext allows a jury to infer that there was no legitimate explanation for the adverse [employment]

[7] The defendants do not dispute Bosah's argument, made in his opening brief, that he may argue that the second suspension was in retaliation for his filing the instant action in Superior Court. While an MCAD filing is a jurisdictional prerequisite to bringing a c. 151B claim in Superior Court, see Everett v. 357 Corp., 453 Mass. 585, 600 (2009), the Supreme Judicial Court has held that, "[s]o long as the alleged retaliatory acts relate to an earlier complaint, a plaintiff is not required to exhaust his administrative remedies before he may bring to court a retaliation claim." Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 618 (2005). More generally, "retaliation claims [are] preserved so long as [the] retaliation [is] 'reasonably related to and grows out of' [the] discrimination complained of to [the] agency, e.g., 'retaliation . . . for filing the agency complaint itself.'" Everett, 453 Mass. at 603, quoting Clockedile v. New Hampshire Dep't of Corrections, 245 F.3d 1, 5-6 (1st Cir. 2001). This principle logically extends to retaliation for filing an action in Superior Court.

> decision and that the employer's true motivation was retaliatory" (quotations and citations omitted).

Verdrager, 474 Mass. at 406.

As just discussed, Bosah has produced sufficient evidence that he engaged in protected conduct and that he suffered an adverse employment action, so the only remaining issue with respect to his prima facie showing is causation. Bosah argues that the temporal proximity of the October 7, 2011 suspension to the September 19, 2011 MCAD filing suffices for a prima facie showing of causation, and we agree. "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" Mole v. University of Mass., 442 Mass. 582, 595 (2004), quoting Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (per curiam). Eighteen days is sufficiently close. See Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999), cited in Mole, 442 Mass. at 595 (one and one-half months between protected conduct and adverse action is sufficiently proximate to permit an inference of causation, although three months is not).

The defendants respond that there is no evidence in the record that, when DePiano suspended Bosah, he knew that Bosah

had filed the MCAD complaint, and that evidence of such knowledge is a necessary component of a prima facie retaliation case. See Mole, 442 Mass. at 593-594. But Leo, in her deposition, seems to state that suspension decisions go through her, and a reasonable juror could conclude that she, as one of the parties named in the MCAD charge, would have known about it.

Bosah also argues that his June 18, 2012 suspension was retaliatory. Although temporal proximity to the MCAD and Superior Court filings is insufficient to raise an inference of causation here, a reasonable juror could find it no coincidence that Leo set the hearing at the labor relations office for the same day that she and the city filed their answer in Superior Court, particularly in light of Bosah's deposition testimony that she often disciplined him at sensitive times (i.e., holidays).

Having made a satisfactory prima facie showing, the burden shifts to the defendants to introduce a legitimate, nonretaliatory reason for their suspensions of Bosah. They argue that the first suspension was for insubordination and conduct unbecoming a city employee, and that the second was for poor performance. These are legitimate, nonretaliatory reasons, so the burden shifts back to Bosah to introduce evidence sufficient to support a finding that those reasons are pretextual.

With respect to the first suspension, Bosah points to a discrepancy between the alleged conduct giving rise to his suspension and a performance review written in February of 2012. He was suspended at least in part for inappropriate conduct toward his supervisor, Velazquez, but she wrote in the performance review that Bosah "shows [a] great deal of respect and proper manners to his coworkers . . . ." A rational jury could conclude that the victim of conduct so insubordinate that it warranted suspension would not write this in a performance review only a few months later, that Velazquez therefore was not the victim of such insubordinate conduct, and hence that the reason given for the suspension was false and pretextual.

With respect to the second suspension, Bosah responds that, in this case and others, he has unfairly been singled out for suspension. Specifically, he testified in his deposition that his suspension was for errors of the kind that other employees have been permitted to correct, and that his performance therefore was not the real reason for his suspension. We must accept these statements as true on summary judgment, and they support an inference of pretext.

Finally, the defendants argue that we should give significant weight to the arbitrator's findings that Bosah was disciplined for just cause. But the decision of an arbitrator in a union grievance case is afforded no "deference or special

weight" in a statutory discrimination or retaliation case. Boston, 39 Mass. App. Ct. at 239. Moreover, the arbitrator's decisions rested primarily on credibility determinations resolved against Bosah, which is an inappropriate ground on which to grant summary judgment. See Bulwer, 473 Mass. at 689. These decisions therefore do not mandate affirmance.

Conclusion. Our job here is not to weigh the evidence, but to determine whether there is sufficient evidence in the record to raise a genuine issue of material fact. We therefore do not conclude that the plaintiff was discriminated or retaliated against, nor do we determine whether the defendants' proffered reasons for their actions were genuine or pretextual. We hold only that there was sufficient evidence in the record to require resolution by a jury and to preclude summary judgment. The judgment therefore is reversed, and the case is remanded to the Superior Court for further proceedings consistent with this

memorandum and order.[8]

So ordered.

By the Court (Rubin,
Maldonado & Lemire, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: August 9, 2019.

[8] The plaintiff's request for appellate attorney's fees is denied without prejudice as premature. See Brown v. F.L. Roberts & Co., 452 Mass. 674, 689 (2008).

[9] The panelists are listed in order of seniority.